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tration suit for winding up a decedent's estate, where he is a debtor of the estate on a purely legal claim—seems to be equally clear.

The last point of interest in the principal case, involves the equitable doctrine of "fraud presumed from the relations of the parties"—the specific principle applied being, that where one person occupies toward another a confidential relation, and by means of that relation obtains an advantage at the expense of the other, there is a presumption, more or less strong according to the circumstances of the parties, that such benefit was obtained by undue influence, which presumption it is incumbent on the person so benefited to remove. And, in such cases, where the other party by reason of extreme youth or old age, or mental infirmity, or of the peculiar situation, rendering it possible for the beneficiary to exercise an undue influence, the *absence of independent advice* is a potent factor in establishing the actual or constructive fraud. The leading case on this subject is *Huguenin* v. *Baseley*, 14 Ves. 273, which has been followed by numerous cases in Virginia—among them, *Statham* v. *Ferguson*, 25 Gratt. 38; *Davis* v. *Strange*, 86 Va. 793, and *Todd* v. *Sykes*, 33 S. E. 517. The first two of these cases afford striking illustrations of the application of the principle. See Bispham's Equity, secs. 231 *et seq.*

The principal case enforces this doctrine with manifest propriety—applying it to a case where the confidential agent of an old woman, eighty years of age, to whom he is largely indebted, produces after her death a release to him of such indebtedness, executed by her shortly before her death—the amount released constituting something like one-half of her estate.

METROPOLITAN LIFE INSURANCE CO. v. RUTHERFORD.*

Supreme Court of Appeals: At Richmond.

March 15, 1900.

Absent, *Riely* and *Harrison*, JJ.

1. INSURANCE.—*Warranties—Conflict between statements in application and proof of loss—Demurrer to evidence.* If a life policy makes the statements of the application on which it is issued warranties, and such application states that the death of the father of the assured was caused by one disease and the proof of loss made by the beneficiary and offered in evidence by him states that said death was caused by a different disease, on a demurrer to the evidence of the beneficiary, in an action against the insurance company, judgment should be given for the company.

2. INSURANCE.—*Proof of loss—Evidence.* The preliminary proofs of loss under an insurance policy introduced in evidence generally by the beneficiary are *prima facie* evidence in favor of the insurance company of the facts therein stated. The company has the right to rely on the truth of such statements, and, in the absence of evidence of mistake or misapprehension of facts, the beneficiary who made such statements is bound by them.

* Reported by M. P. Burks, State Reporter.

3. INSURANCE.—*Warranties—Materiality of statements*—Where the answers to questions propounded in an application for insurance are made warranties by the terms of the contract of insurance, its validity depends upon the literal truth of such answers, and it is a matter of no consequence whether they are material to the risk or not. Being warranties, they are in the nature of conditions precedent, and like them, must be strictly complied with.

Error to a judgment of the Law and Equity Court of the city of Richmond, rendered April 28, 1899, in an action of debt, wherein the defendant in error was the plaintiff, and the plaintiff in error was the defendant. *Reversed.*

The opinion states the case.

E. Rand. Wellford and *Leake & Carter*, for the plaintiff in error.

R. W. Ivey, J. Samuel Parrish and *P. A. L. Smith*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This is the second time this case has been before this court. Upon the former writ of error the judgment was reversed and the cause remanded, with leave to the plaintiff to amend her declaration. The declaration was amended and another trial had, in which a verdict and judgment were rendered against the defendant. To that judgment this writ of error was awarded.

Several errors are assigned, among them that the trial court ought to have rendered judgment in favor of the defendant instead of the plaintiff on the demurrer to the evidence. If this be true, it will be unnecessary to consider the other assignments of error.

Upon the trial the plaintiff offered in evidence the two policies of insurance sued on, the applications therefor, proofs of the death of the insured, and certain oral evidence. The defendant, without introducing any testimony, demurred to the plaintiff's evidence.

By the terms of the policies of insurance, which are substantially alike, the answers and statements contained in the printed and written application for them were all made warranties and parts of the contracts of insurance. One of the conditions (the fourth) of each policy, which is expressly made a part of the contract, provides, among other things, that if any of the statements or warranties referred to in the policy, or upon which it was granted, was not true, that the policy should be void. Among the questions required to be answered in each application was, whether the parents of the insured were living or dead,

and, if dead, the cause of death. In reply to that question the insured stated that his father was dead, and that the cause of his death was *cholera morbus.*

It was further provided by each contract of insurance (condition sixth) that proofs of death under it should be made upon blanks to be furnished by the company, and that the proofs should contain answers to each and every question propounded in the blanks to the claimant and other persons; that the contents of such proofs of death should be evidence of the facts stated therein in behalf of, but not against, the insurance company; and that no suit (condition seventh) should be brought against the company under the policy until ten days should have elapsed after filing in the home office proofs of death upon all the forms furnished by the company.

In the blanks furnished for proofs of death the plaintiff, the beneficiary in the policies, was asked to state the cause of the death of the father of the insured, and she answered: "Fistula." This answer, it is insisted, shows that the statement of the insured in his application for insurance that his father died of *cholera morbus* was untrue, and that there was therefore a breach of the warranty which rendered the policies void, and prevented any recovery by the plaintiff. By the express terms of the contracts of insurance those proofs were declared to be evidence in favor of the company, but not against it. But, independent of any agreement to that effect, the preliminary proofs presented to an insurance company, in compliance with the condition of its policy of insurance, are admissible as *prima facie* evidence of the facts stated therein in favor of the company. They were intended for the action of the company, and upon their truth it had the right to rely, and, unless corrected for mistake, the plaintiff was bound by them. Good faith required that she should be held to answers and statements made in the proofs of loss until it was shown that she was under a misapprehension of the facts or ignorant of material matters subsequently ascertained. *Insurance Co.* v. *Newton*, 22 Wall. 32; 4 Joyce on Ins., sec. 3766.

If the plaintiff had not introduced the proofs of loss the defendant could have done so; but the plaintiff introduced them. The record does not state for what purpose they were introduced, but they seem to have been offered as evidence generally, and not merely for the purpose of showing that the company had knowledge of the *death* of the insured, and that proofs of death had been furnished as required by the conditions of the policy, as the plaintiff insists. If their introduction

could have been limited to that particular purpose, as to which we express no opinion, no effort was made by her to so limit them. Having been introduced in evidence generally and like the other testimony, they must be considered in all their parts, and effect must be given to all they prove or tend to prove.

In the case of *Insurance Co.* v. *Newton, supra,* it was held that the preliminary proofs presented to an insurance company, in compliance with the condition of its policy of insurance, are admissible as *prima facie* evidence of the facts stated therein against the insured and on behalf of the company.

In *The North American Fire Ins. Co.* v. *Zaunger,* 63 Ill. 464, a suit to recover for a loss under a policy of insurance, the plaintiff introduced in evidence generally his own affidavit of the loss made to the company, which showed that the house had become vacant some three weeks before the loss. There was no attempt made to limit the effect of the evidence to the fact that preliminary proofs had been made, and it was held that the evidence must be considered for all the purposes of the case, though its effect was to defeat the plaintiffs' recovery.

In the case of *Helwig* v. *Mutual Life Ins. Co.,* 132 N. Y. 331, the policy sued on provided that the answers of the insured to the company's medical examiner were warranted to be true. In answer to the question, "When last attended by a physician, and cause," the reply was, "Six years; measles." Upon the trial, for the purpose of proving the death of the insured, the plaintiff produced in evidence a verified certificate, made about four months after the application, in which the attending physician stated that he had been the medical attendant or adviser of the decedent "for astralgia, about one and a-half years ago." That certificate, introduced in evidence by the plaintiff, it was held could be relied on by the insurance company as evidence to show the falsity of the answer made by the insured to the medical examiner.

In the case under consideration, the proofs of loss show that the death of the father of the insured was caused by a disease other than that stated in the application for insurance, thus showing *prima facie* the falsity of one of the answers of the insured which he had warranted to be true. No effort was made to show that this statement in the proof of loss was the result of a mistake, or was not true, although the plaintiff herself, the party who made the statement, testified in the case. In this condition of the record, the falsity of the answer of the insured as to the cause of his father's death must be treated as established. It may be, as the beneficiary insists, that this answer was not

really material to the risk assumed by the company; but that does not affect the question.

Where the answers to questions propounded in an application for insurance are made warranties by the terms of the contract of insurance, its validity depends upon the literal truth of such answers, and it is a matter of no consequence whether they are material to the risk or not. Being warranties, they are in the nature of conditions precedent, and, like them, must be strictly complied with. *Lynchburg Fire Ins. Co.* v. *West*, 76 Va. 575; *Va. Fire & Marine Ins. Co.* v. *Morgan*, 90 Va. 290; *Home Ins. Co.* v. *Sibert*, 96 Va. 403. The warranty being untrue, the plaintiff cannot recover.

We are of opinion, therefore, that the defendant's demurrer to the evidence ought to have been sustained, and judgment given for it.

The judgment of the trial court must be reversed and set aside, and this court will enter such judgment as it ought to have entered.

Reversed.

NOTE.—The decision in this case seems to bear hard upon the beneficiary under the policy, and yet, under the technical rules of law, it was doubtles correct.

The rule of law that a breach of warranty avoids the policy, howsoever immaterial the breach—often made also a part of the contract, as in the principal case—is extremely severe in its operation, and for that reason has been abolished and prohibited in many of the States. We understand that some legislation of this kind was had at the last session of the Virginia legislature. (See synopsis of legislation *post*, where specific reference will be made to such statute if a copy can be had before this number goes to press.)

The plaintiff seems to have unwittingly fallen into a legal pitfall. The warranty in the application was, that the father of the insured had died with *cholera morbus*. In the proofs of loss furnished by the beneficiary—in which, by the terms of the policy, were to be answered all questions propounded in the blanks furnished for that purpose by the company—the cause of the death of the insured's father was stated to be *fistula*. As far as can be gathered from the opinion, there was no explanation of this discrepancy. It was a palpable admission by the plaintiff, against her own interest, that the statement in the application was false. On the demurrer to evidence, this admission of a breach of a warranty, uncontradicted, seems to have left the court no alternative but that which it adopted—to find that there was a breach of warranty, and that the policy was thereby avoided.

The court seems to intimate, though we are glad to observe that it does not commit itself to the proposition, that an insurance company may, by contract with the insured, lawfully stipulate as to what shall be evidence and what shall not. We should be sorry to see any principle established in this State by which parties will be permitted by contract, in advance of any controversy, thus to alter the established rules of evidence. If this were permitted, an insurance company, by

inserting a provision in its policy that "this policy shall be the sole evidence introduced against the company in case of litigation," or "no parol evidence shall be admissible against the company," might practically exclude all material testimony in behalf of the insured. True, such a company would in the end lose business, but much harm would be done before the effect of such a clause were brought home to the public. Fire insurance companies have for a long time endeavored, but without success, to exclude estoppels and proof of a broader authority in their agents than is specifically bestowed in their written commissions, by inserting in the policies a provision that the agent shall be regarded "as the agent of the insured"—or to have no authority to waive any of the provisions of the policy "unless authorized to do so in writing," or unless the waiver is "endorsed in writing on the policy." Such clauses the courts have practically disregarded. As said in Richards on Insurance, p. 90, "Courts do not look with much favor on attempts by the parties to abrogate by agreement the established rules of evidence."

VASHON'S EXECUTRIX v. VASHON AND OTHERS.*

Supreme Court of Appeals: At Richmond.

March 15, 1900.

1. REMAINDERS—*Vesting of estates.* If the language of the instrument creating an estate leaves it doubtful whether the purpose was to create a vested or contingent estate, the courts will hold it to be vested, and this is all that is meant when it is said that "courts lean to the vesting of estates."
2. ESTATES—*Grant to A for life with remainder to the issue of his body per stirpes.* Under a grant to a trustee to hold for A for life, and at his death to sell the trust subject and divide the proceeds of such sale among the issue of the body of A, the same taking *per stirpes* and not *per capita*, upon the death of A, his surviving children and grandchildren take by stocks the whole of the trust subject. Children born to A, but who died in his lifetime, without issue, took no interest in the trust subject. Their interest was contingent upon surviving A.

Appeal from a decree of the Law and Equity Court of the city of Richmond, pronounced January 26, 1899, in a suit in chancery wherein the appellee, Janie F. Vashon, was the complainant, and the appellant and others were the defendants. *Affirmed.*

This suit was brought for the purpose of having a construction of a deed from Jno. T. Sublett and wife to Edward W. Morris, trustee, bearing date October 31, 1850, and a sale of the property thereby conveyed and a division of the proceeds of sale amongst those entitled

* Reported by M. P. Burks, State Reporter.